No. 03-1499

In The Supreme Court of the United States

HALIA S. MARSH,
Executrix of the Estate of Robert Sidney Marsh;
THEODORE C. McLEOD,
Executor of the Estate of Beulah McLeod;
THOMAS R. SPEER,

Petitioners,

v.

W. R. GRACE & COMPANY;
FRIT INDUSTRIES, INCORPORATED;
CONTINENTAL CASUALTY COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY

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CONSTITUTIONAL PROVISION INVOLVED

The Bill of Rights provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

PETITIONERS' REPLY

Preliminary Statement

Why did Grace lie?

Initially it appeared that Grace had convinced Frit, which bragged that Grace was good at "suppressing the potentially damaging circumstances around the tobacco situation", to let Grace handle the contaminated fertilizer situation in 1984 in order to minimize damages to 1800 farmers. Grace had learned from an almost identical contamination in 1979 that a lie would have to be concocted to cover up all the dangerous phenoxy acid chemicals contained, **illegally**, in the Grace Gold Dollar Fertilizer, for which Frit had provided micronutrient mix. (In 1979 1200 farmers were paid a total of $20 Million when their tobacco was taken off the market, because fertilizer utilized contained, **illegally**, the dangerous phenoxy acid picloram, which was not covered up.)(All these facts were proved in the second Grace v. Frit trial when their insurance companies could not initially agree to a settlement. The trial court denied Petitioners any Discovery about the final settlement withdrawing Frit's appeal from a $12 Million Dollar jury verdict in the second trial [$1 Million first trial-2-4D-not proved].)

Subsequently it was discovered that Frit and Grace had EPA problems; therefore, neither wanted any more EPA problems. They did not want the world, including the EPA and these farmers, to know that there were multiple phenoxie herbicide chemicals in the Gold Dollar Fertilizer, because they undoubtedly knew about the peer review article listing picloram and 2-4D as phenoxy acids - **MALIGANT LYMPHOMS AND EXPOSURE TO CHEMICALS ESPECIALLY ORGANIC SOLVENTS CHKIRIOHENOLS AND PHENOXY ACIDS: A CASE-CONTRPL STUDY (JA 894) Received 11 July 1980, Accepted 24 October 1980. "Combined exposure of these chemicals seemed to increase the risk." "Exposure to phenoxy acids or chlorophenols, which are related, was found to be associated with about a 6-fold increase in risks for soft-tissue sarcomas in this study (Hardell & Sandstrom, 1979)." The article cites exposure to 2-4D and Picloram as phenoxy acids.**

What was the lie? The lie told by Grace was that only

small trace amounts of Dicamba were in the Gold Dollar Fertilizer, and it was safe to work the tobacco and eat from vegetable gardens which also utilized this Gold Dollar Fertilizer. In order to minimize damages by preventing all the tobacco being taken off the market, Grace decided to publish that only small traces of Dicamba were in the Gold Dollar Fertilizer, and it was safe to eat from vegetable gardens which also utilized this Gold Dollar Fertilizer. Grace knew that the phenoxy acid Dicamba could cause similar symptoms in the tobacco as other phenoxy acids such as picloram and 2-4D, but Grace insisted the tobacco was still marketable.

Who was lied to by Grace? Grace lied, not only to the farmers but to the North Carolina Commissioner of Agriculture and the North Carolina Commissioner of Insurance, the news media and the public at large. Grace even lied to its own witnesses such as Dr. Kittrell, whose affidavit states he was told by Grace that Dicamba was the only contaminate. (See Petition,Foman v. Davis, 371 U. S. 1789(1962)

How was the lie disseminated by Grace? Grace's lie was disseminated by word of mouth from Grace representatives to farmers, letters and other memos and correspondence, but the most egregious publication was in **full page newspaper ads** throughout North Carolina. These ads were called the "Dicamba" ads, because no other phenoxy acid was mentioned in the ad except the word "Dicamba" .

Why was this a lie? There were multiple phenoxy acids (picloram, 2,4D and dicamba) **illegally** in the Gold Dollar Fertilizer, known to Grace by its own **secret test samples,** obtained before the first ad publication and never corrected in the newspapers, not to mention Grace never giving corrected information to Dr. Kittrell (Clempson University Extension), who was one of the Grace v. Frit star withesses. Another star witness, Dr. McNair (VPI University Extension, who identified picloram and 2,4D as contaminates in the fertilizer) testified to an "extremely large concentration" of the phenoxy acid in one sample at 10,000 parts per billion. (Petition pages 19 and 20. This was part of approximately 20 pages of his testimony in the second trial not sequentially numbered with the entire transcript purchased by one of counsel's clients from the court reporter.)

This was 5 times more deadly than that found in the 1979 Smith-Douglas case, which took all the tobacco off the market. Yet Grace and these defendants conspired to suppress this evidence during the growing season at a high risk to these farmers and probably those who smoked the 1984 tobacco. Grace's full page newspaper ads stated there were only small trace accounts of dicamba and Grace told the farmers it was safe to raise the tobacco and eat from gardens fertilized with their Gold Dollar fertilizer. Dr. McNair's testimony proves the lie – "small trace amounts" was egregiously false. He further testified to other dirty samples with several major peaks and confirmed the 2-4D phenoxy at the Frit plant and in the Gold Dollar Fertilizer. See Foman v. Davis, 371 U. S. 178(1962).

Reasons for Granting the Writ

In Howerton v. Arai Helmet, Ltd.,358 N.C._____(2004), the North Carolina Supreme Court suggests that the Daubert case should be revisited, relaxed and reconciled, as was needed in **Ruiz-Troche, infra,** (another 1st Circuit case, which allowed medical testimony, excluded by the trial judge who ignored **peer review publications**, as was done in the case suib judice by the trial judge and the 4th Circuit), as follows:

"One of the most troublesome aspects of the *Daubert* "gatekeeping" approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We have great confidence in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*. Indeed, this concern was adeptly described by the Ninth Circuit after *Daubert* had been remanded and again appealed:

[T]hough we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by

the scientific method."

The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.

Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method." ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995), *cert. denied*, 516 U.S. 869, 133 L. Ed. 2d 126 (1995).** This same sentiment has been echoed in the writings of countless other courts and commentators. *See, e.g.*, ***Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998)** (noting that "choreographing the *Daubert* pavane remains an exceedingly difficult task. Few federal judges are scientists, and none are trained in even a fraction of the many scientific fields in which experts may seek to testify."); *Zuchowicz v. United States*, 870 F. Supp. 15, 19 (D. Conn. 1994) ("[J]udges may not always have the 'special competence' to resolve complex issues which stand 'at the frontier of current medical and epidemiological inquiry.'" (citations omitted)); *Goeb v. Tharaldson*, 615 N.W.2d 800, 812-13 (Minn. 2000) (observing that "*Daubert* takes from scientists and confers upon judges uneducated in science the authority to determine what is scientific. This approach, which necessitates that trial judges be 'amateur scientists,' has also been frequently criticized." (citations omitted)); 29 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6266, at 271 (1997) ("It is unrealistic to think that courts can resolve disputes concerning the scientific validity of issues on the frontiers of modern science where even the experts may

disagree. As a result, *Daubert* has been harshly criticized for imposing such a burden on the lower courts." (footnotes omitted)); George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other ScientificEvidence During the Decision-Making Process*, 72 St. John's L. Rev. 291, 333 (1998) (contending that "few judges possess the academic credentials or the necessary experience and training in scientific disciplines to separate competently high quality, intricate scientific research from research that is flawed").

When the United States Supreme Court jettisoned the "rigid 'general acceptance' requirement" of *Frye*, it did so in order to further the "'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'" *Daubert*, 509 U.S. at 588, 125 L. Ed. 2d at 480. We believe that in practice, however, application of the "flexible" *Daubert* standard has been anything but liberal or relaxed and that trial courts, such as the one in the present case, have often been reluctant to stray far from the original *Daubert* factors in their analysis of the reliability of expert testimony. As expressed by one critic,

> **Those who predicted that trial judges would flex their gatekeeper muscles to exclude vast quantities of plaintiffs' proposed expert causation opinion testimony in products liability cases have turned out to be right. The post-*Daubert* era can fairly be described as the period of "strict scrutiny" of science by non-scientifically trained judges.**

Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DePaul L. Rev. 335, 341 (1999); *see also Goeb*, 615 N.W.2d at 812-14 (rejecting *Daubert* on grounds that, among other things, *Daubert* has not achieved its stated intention of relaxing the barriers to the admissibility of expert testimony); 2 Michael H. Graham, *Handbook of Federal Evidence* § 702.5, at 461-62 (5th ed. 2001) ("*Daubert* is a very incomplete case if not a very bad decision. It did not, in any way, accomplish what it was meant to, i.e., encourage more liberal admissibility of expert witness evidence. In fact, *Daubert* overall in practice actually created a more stringent test for

expert evidence admissibility especially in civil cases."); David Crump, *The Trouble with* Daubert-Kumho*: Reconsidering the Supreme Court's Philosophy of Science*, 68 Mo. L. Rev. 1, 40 (2003) ("[A]s often happens, a premature pronouncement that was intended to be flexible has become an established set of criteria. It was foolhardy for the Court to ignore what was going to happen, which was that trial judges would consider the four *Daubert* factors to be legal principles established by the Supreme Court." (footnotes omitted)).

As a consequence of these stringent threshold standards for admitting expert testimony, we are concerned with the case-dispositive nature of *Daubert* proceedings, whereby parties in civil actions may use pre-trial motions to exclude expert testimony under *Daubert* to bootstrap motions for summary judgment that otherwise would not likely succeed. As expressed in dicta by one federal trial court,

This court notes that inherently, the judge's role in a *Daubert* determination [is] fraught with conflict. In most cases, if the court bars the testimony of one party's expert witness or witnesses, that party is unable to present an essential element of his or her claim, or to proffer a defense. Accordingly, judges are aware that applying *Daubert* heavy-handedly has the effect of lightening one's caseload, as a party stripped of its expert often must dismiss the claims or settle thelawsuit. *Brasher v. Sandoz Pharms. Corp.*, 160 F. Supp. 2d 1291, 1295 n.12 (N.D. Ala. 2001); *see also* Lloyd Dixon & Brian Gill, RAND Institute for Civil Justice, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision* 62 (2001) ("Challenges to expert evidence increasingly resulted in summary judgment after *Daubert*.").

Procedurally, this imbalance may be explained because trial courts apply different evidentiary standards when ruling on motions to exclude expert testimony and motions for summary judgment. In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). Where there are genuine,

conflicting issues of material fact, the motion for summary judgment must be denied so that such disputes may be properly resolved by the jury as the trier of fact. *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) ("Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue.").

Not so in the case of preliminary motions to exclude expert testimony under *Daubert*, which are resolved under Rule of Evidence 104(a). Here, trial courts are not bound by the rules of evidence, are not required to view the evidence in a light favorable to the non-movant, and may preliminarily resolve conflicting issues of fact relevant to the *Daubert* admissibility ruling. N.C.G.S. § 8C-1, Rule 104(a). Taking advantage of these procedural differences, a party may use a *Daubert* hearing to exclude an opponent's expert testimony on an essential element of the cause of action. With no other means of proving that element of the claim, the non-moving party would inevitably perish in the ensuing motion for summary judgment. By contrast, a party who directly moves for summary judgment without a preliminary *Daubert* determination will not likely fare as well because of the inherent procedural safeguards favoring the non-moving party in motions for summary judgment.

In such instances, we are concerned that trial courts asserting sweeping pre-trial "gatekeeping" authority under *Daubert* may unnecessarily encroach upon the constitutionally- mandated function of the jury to decide issues of fact and to assess the weight of the evidence. *See* N.C. Const. art I, § 25. *See also Brasher*, 160 F. Supp. 2d at 1295 (applying *Daubert*, but acknowledging that "[f]or the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case"); *Logerquist v. McVey*, 196 Ariz. 470, 488, 1 P.3d 113, 131 (2000) ("The *Daubert/Joiner/Kumho* trilogy of cases . . . puts the judge in the position of passing on the weight or credibility of the expert's testimony, something we believe crosses the line

between the legal task of ruling on the foundation and relevance of evidence and the jury's function of whom to believe and why, whose testimony to accept, and on what basis."); *Bunting v. Jamieson*, 984 P.2d 467, 472 (Wyo. 1999) (adopting *Daubert*, but nonetheless expressing concern that "application of the *Daubert* approach to exclude evidence has been criticized as a misappropriation of the jury's responsibilities. . . . '[I]t is imperative that the jury retain its fact-finding function.'" (citations omitted)). Although our criticism of *Daubert* is largely anecdotal and by no means exhaustive, given the serious implications of these concerns, we believe that on balance the North Carolina law which has coalesced in *Goode* establishes a more workable framework for ruling on the admissibility of expert testimony under North Carolina Rule of Evidence 702. Long before *Daubert* was decided, North Carolina had in place a flexible system of assessing the foundational reliability of expert testimony, the practicability of which is evidenced by the case law. Within this system, our trial courts are already vested with broad discretion to limit the admissibility of expert testimony as necessitated by the demands of each case. Requiring a more complicated and demanding rule of law is unnecessary to assist North Carolina trial courts in a procedure which we do not perceive as in need of repair. We therefore expressly reject the federal *Daubert* standard upon which both the trial court and the Court of Appeals erroneously based their respective rulings. North Carolina is not, nor has it ever been, a *Daubert* jurisdiction."

Ruiz-Troche, supra, is a good example of of the need for reconciliation between the !st Circuit and the 4th Circuit. (This highlights the conflict between the two circuits, already highlighted by the trial judge in the **Woburn** case relying on the medical opinions of Dr. Levin.) It is significant to note that this case compares with the case sub judice on the issues of "dose" and "peer review".

"The publication of these pieces and their exposure to peer review serve as independent indicia of the reliability of the half-life technique. By the same token, publication and peer review also demonstrate a measure of acceptance

of the methodology within the scientific community. " "Dr. O'Donnell's technique has been subjected to, and survived, the rigors of testing, publication, and peer review, and it appears to have won significant (if not universal) acceptance within the scientific community. **Daubert** does not require that a party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct. As long as an expert's scientific testimony rests upon "good grounds, based on what is known," **Daubert**, 509 U.S. at 590 (internal quotation marks omitted), it should be tested by the adversary process competing expert testimony and active cross-examination - rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies, see id. at 596. " **Ruiz-Troche, supra.**

We again address point (4) of Defendant's Brief on page 10, having just addressed the others. The defense insists the Marsh cancer was caused by smoking; but Dr.Levin distinguished the case sub judice from smoker-lung cancer cases since Mr. Marsh suffered from an undifferentiated large cell tumor while smokers generally suffer from small cell cancer. Mr. Marsh's tumor is rare in older cigarette smokers. **Dr. Levin testified, excluding other possible confounding or contributing etiologies, "The majority of lung cancers can be categorized into four histologic types. Squamous cell carcinoma, small-cell undifferentiated carcinoma, large-cell undifferentiated carcinoma, and adenocarcinoma 31 . There is a well established direct correlation between the dose of cigarette smoke and the first two types of cancer. The type of cancer that Mr. Marsh suffered (undifferentiated large cell) is not correlated with the dose of cigarette smoke. It's incidence is actually inversely related to the dose of cigarette smoke and is not common in people over 60." (Note: Defendants quote on page 9 of their brief is taken out of the context of his entire testimony.)**

The analysis by the 1st Circuit of the medical opinions on these issues supports a reversal of the case sub judice in which the trial judge and the 4th Circuit did not consider peer review

publications relied on by Dr. Levin and Dr. Brenneman published by the prestigious American Medical Association and a Swedish University Hospital Case Control Study, which identifies picloram and 2,4D as phenoxy acids that are "a causative factor in malignant lymphoma." The trial judge and the 4th Circuit; therefore, erred in basing their decision and opinion on the mistaken belief that picloram cannot cause cancer. This case is most egregious for the wrong side winning because of procedural rulings. The Petition should be allowed.

CONCLUSION

It is respectfully submitted that the Judgment of the Trial Court should be reversed; and the Rule 60 Motion heard.

Respectfully submitted,

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